

AMENDED IN SENATE APRIL 4, 2011

SENATE BILL

No. 362

Introduced by Senator Berryhill

February 15, 2011

An act to amend ~~Section 4660~~ *Sections 1777.7 and 3075* of the Labor Code, relating to ~~workers' compensation~~ *employment*.

LEGISLATIVE COUNSEL'S DIGEST

SB 362, as amended, Berryhill. ~~Workers' compensation: permanent disability rating schedule. Employment: apprenticeships.~~

(1) Existing law requires that the ratio of apprentice work to journeyman work performed on public works be not less than one hour of apprentice's work for every 5 hours by a journeyman. A violation of this provision is punishable by a civil penalty calculated based on the number of days of noncompliance. In the event of a willful, serious violation of this provision, the Director of Industrial Relations may also debar the contractor from bidding on public works projects, as specified.

This bill would provide for additional civil penalties, calculated based on hours and wage rates, as specified, for a contractor or subcontractor who fails to employ enough apprentice labor on a public works project.

(2) Existing law provides that an apprenticeship program may be administered by a joint apprenticeship committee, unilateral management or labor apprenticeship committee, or an individual employer and provides specified conditions for the establishment of new apprenticeship programs in the building and construction trades.

This bill would remove the specified conditions required for the establishment of a new apprenticeship program in the building and construction trades.

~~Existing law establishes a workers' compensation system, administered by the Administrative Director of the Division of Workers' Compensation, to compensate an employee for injuries sustained in the course of his or her employment.~~

~~Existing law requires the administrative director to formulate a rating schedule for determining the percentage of an injured employee's permanent disability in accordance with certain criteria.~~

~~This bill would make a technical, nonsubstantive change to the above-described provisions.~~

Vote: majority. Appropriation: no. Fiscal committee: ~~no~~ yes.
State-mandated local program: no.

The people of the State of California do enact as follows:

1 *SECTION 1. Section 1777.7 of the Labor Code is amended to*
2 *read:*

3 1777.7. (a) (1) A contractor or subcontractor that is determined
4 by the Chief of the Division of Apprenticeship Standards to have
5 knowingly violated Section 1777.5, *except as provided for in*
6 *paragraph (2)*, shall forfeit as a civil penalty an amount not
7 exceeding one hundred dollars (\$100) for each full calendar day
8 of noncompliance. The amount of this penalty may be reduced by
9 the Chief if the amount of the penalty would be disproportionate
10 to the severity of the violation. A contractor or subcontractor that
11 knowingly commits a second or subsequent violation of Section
12 1777.5, *except as provided for in paragraph (2)*, within a three-year
13 period, where the noncompliance results in apprenticeship training
14 not being provided as required by this chapter, shall forfeit as a
15 civil penalty the sum of not more than three hundred dollars (\$300)
16 for each full calendar day of noncompliance. Notwithstanding
17 Section 1727, upon receipt of a determination that a civil penalty
18 has been imposed by the Chief, the awarding body shall withhold
19 the amount of the civil penalty from contract progress payments
20 then due or to become due.

21 (2) *Where the violation is for failing to employ an apprentice,*
22 *in addition to the penalties set forth in paragraph (1), a contractor*
23 *or subcontractor shall also forfeit as a civil penalty an amount*
24 *not exceeding the sum determined as follows:*

1 (A) First, calculate the total journeyman hours worked in each
2 craft on the project that could have been performed by an
3 apprentice.

4 (B) Multiply the hours for each craft by the ratio of apprentice
5 hours required by Section 1777.5.

6 (C) Deduct the actual number of apprentice hours worked by
7 state-registered apprentices, as defined by Section 3077, of the
8 same craft on the project for that employer.

9 (D) Multiply the resulting difference by the total hourly wage
10 rate for the final period apprentice in that craft, according to the
11 wage determination applicable to the specified project.

12 ~~(2)~~

13 (3) In lieu of the ~~penalty~~ penalties provided for in this
14 subdivision, the Chief may, for a first-time violation and with the
15 concurrence of an apprenticeship program described in subdivision
16 (d), order the contractor or subcontractor to provide apprentice
17 employment equivalent to the work hours that would have been
18 provided for apprentices during the period of noncompliance.

19 (b) In the event a contractor or subcontractor is determined by
20 the Chief to have knowingly committed a serious violation of any
21 provision of Section 1777.5, the Chief may also deny to the
22 contractor or subcontractor, and to its responsible officers, the
23 right to bid on or be awarded or perform work as a subcontractor
24 on any public works contract for a period of up to one year for the
25 first violation and for a period of up to three years for a second or
26 subsequent violation. Each period of debarment shall run from the
27 date the determination of noncompliance by the Chief becomes a
28 final order of the Administrator of Apprenticeship.

29 (c) (1) An affected contractor, subcontractor, or responsible
30 officer may obtain a review of the determination of the Chief
31 imposing the debarment or civil penalty by transmitting a written
32 request to the office of the Administrator within 30 days after
33 service of the determination of debarment or civil penalty. A copy
34 of this report shall also be served on the Chief. If the Administrator
35 does not receive a timely request for review of the determination
36 of debarment or civil penalty made by the Chief, the order shall
37 become the final order of the Administrator.

38 (2) Within 20 days of the timely receipt of a request for review,
39 the Chief shall provide the contractor, subcontractor, or responsible
40 officer the opportunity to review any evidence the Chief may offer

1 at the hearing. The Chief shall also promptly disclose any
2 nonprivileged documents obtained after the 20-day time limit at
3 a time set forth for exchange of evidence by the Administrator.

4 (3) Within 90 days of the timely receipt of a request for review,
5 a hearing shall be commenced before the Administrator or an
6 impartial hearing officer designated by the Administrator and
7 possessing the qualifications of an administrative law judge
8 pursuant to subdivision (b) of Section 11502 of the Government
9 Code. The affected contractor, subcontractor, or responsible officer
10 shall have the burden of providing evidence of compliance with
11 Section 1777.5.

12 (4) Within 45 days of the conclusion of the hearing, the
13 Administrator shall issue a written decision affirming, modifying,
14 or dismissing the determination of debarment or civil penalty. The
15 decision shall contain a statement of the factual and legal basis for
16 the decision and an order. This decision shall be served on all
17 parties and the awarding body pursuant to Section 1013 of the
18 Code of Civil Procedure by first-class mail at the last known
19 address of the party that the party has filed with the Administrator.
20 Within 15 days of issuance of the decision, the Administrator may
21 reconsider or modify the decision to correct an error, except that
22 a clerical error may be corrected at any time.

23 (5) An affected contractor, subcontractor, or responsible officer
24 who has timely requested review and obtained a decision under
25 paragraph (4) may obtain review of the decision of the
26 Administrator by filing a petition for a writ of mandate to the
27 appropriate superior court pursuant to Section 1094.5 of the Code
28 of Civil Procedure within 45 days after service of the final decision.
29 If no timely petition for a writ of mandate is filed, the decision
30 shall become the final order of the Administrator. The decision of
31 the Administrator shall be affirmed unless the petitioner shows
32 that the Administrator abused his or her discretion. If the petitioner
33 claims that the findings are not supported by the evidence, abuse
34 of discretion is established if the court determines that the findings
35 are not supported by substantial evidence in light of the entire
36 record.

37 (6) The Chief may certify a copy of the final order of the
38 Administrator and file it with the clerk of the superior court in any
39 county in which the affected contractor or subcontractor has
40 property or has or had a place of business. The clerk, immediately

1 upon the filing, shall enter judgment for the state against the person
2 assessed in the amount shown on the certified order. A judgment
3 entered pursuant to this section shall bear the same rate of interest
4 and shall have the same effect as other judgments and be given
5 the same preference allowed by the law on other judgments
6 rendered for claims for taxes. The clerk shall not charge for the
7 service performed by him or her pursuant to this section. An
8 awarding body that has withheld funds in response to a
9 determination by the Chief imposing a penalty under this section
10 shall, upon receipt of a certified copy of a final order of the
11 Administrator, promptly transmit the withheld funds, up to the
12 amount of the certified order, to the Administrator.

13 (d) If a subcontractor is found to have violated Section 1777.5,
14 the prime contractor of the project is not liable for any penalties
15 under subdivision (a), unless the prime contractor had knowledge
16 of the subcontractor's failure to comply with the provisions of
17 Section 1777.5 or unless the prime contractor fails to comply with
18 any of the following requirements:

19 (1) The contract executed between the contractor and the
20 subcontractor or the performance of work on the public works
21 project shall include a copy of the provisions of Sections 1771,
22 1775, 1776, 1777.5, 1813, and 1815.

23 (2) The contractor shall continually monitor a subcontractor's
24 use of apprentices required to be employed on the public works
25 project pursuant to subdivision (d) of Section 1777.5, including,
26 but not limited to, periodic review of the certified payroll of the
27 subcontractor.

28 (3) Upon becoming aware of a failure of the subcontractor to
29 employ the required number of apprentices, the contractor shall
30 take corrective action, including, but not limited to, retaining funds
31 due the subcontractor for work performed on the public works
32 project until the failure is corrected.

33 (4) Prior to making the final payment to the subcontractor for
34 work performed on the public works project, the contractor shall
35 obtain a declaration signed under penalty of perjury from the
36 subcontractor that the subcontractor has employed the required
37 number of apprentices on the public works project.

38 (e) Any funds withheld by the awarding body pursuant to this
39 section shall be deposited in the General Fund if the awarding

1 body is a state entity, or in the equivalent fund of an awarding
2 body if the awarding body is an entity other than the state.

3 (f) The Chief shall consider, in setting the amount of a monetary
4 penalty, in determining whether a violation is serious, and in
5 determining whether and for how long a party should be debarred
6 for violating this section, all of the following circumstances:

7 (1) Whether the violation was intentional.

8 (2) Whether the party has committed other violations of Section
9 1777.5.

10 (3) Whether, upon notice of the violation, the party took steps
11 to voluntarily remedy the violation.

12 (4) Whether, and to what extent, the violation resulted in lost
13 training opportunities for apprentices.

14 (5) Whether, and to what extent, the violation otherwise harmed
15 apprentices or apprenticeship programs.

16 If a party seeks review of a decision by the Chief to impose a
17 monetary penalty or period of debarment, the Administrator shall
18 decide de novo the appropriate penalty, by considering the same
19 factors set forth above.

20 (g) The interpretation of Section 1777.5 and this section shall
21 be in accordance with the regulations of the California
22 Apprenticeship Council. The Administrator may adopt regulations
23 to establish guidelines for the imposition of monetary penalties
24 and periods of debarment and may designate precedential decisions
25 under Section 11425.60 of the Government Code.

26 *SEC. 2. Section 3075 of the Labor Code is amended to read:*

27 3075. (a) An apprenticeship program may be administered by
28 a joint apprenticeship committee, unilateral management or labor
29 apprenticeship committee, or an individual employer. Programs
30 may be approved by the chief in any trade in the state or in a city
31 or trade area, ~~whenever the apprentice training needs justify the~~
32 ~~establishment.~~ Where a collective bargaining agreement exists, a
33 program shall be jointly sponsored unless either party to the
34 agreement waives its right to representation in writing. Joint
35 apprenticeship committees shall be composed of an equal number
36 of employer and employee representatives.

37 ~~(b) For purposes of this section, the apprentice training needs~~
38 ~~in the building and construction trades shall be deemed to justify~~
39 ~~the approval of a new apprenticeship program only if any of the~~
40 ~~following conditions are met:~~

1 ~~(1) There is no existing apprenticeship program approved under~~
2 ~~this chapter serving the same craft or trade and geographic area.~~

3 ~~(2) Existing apprenticeship programs approved under this~~
4 ~~chapter that serve the same craft or trade and geographic area do~~
5 ~~not have the capacity, or neglect or refuse, to dispatch sufficient~~
6 ~~apprentices to qualified employers at a public works site who are~~
7 ~~willing to abide by the applicable apprenticeship standards.~~

8 ~~(3) Existing apprenticeship programs approved under this~~
9 ~~chapter that serve the same trade and geographic area have been~~
10 ~~identified by the California Apprenticeship Council as deficient~~
11 ~~in meeting their obligations under this chapter.~~

12 ~~(e) Notwithstanding subdivision (b), the California~~
13 ~~Apprenticeship Council may approve a new apprenticeship~~
14 ~~program if special circumstances, as established by regulation,~~
15 ~~justify the establishment of the program.~~

16 ~~SECTION 1. Section 4660 of the Labor Code is amended to~~
17 ~~read:~~

18 ~~4660. (a) In determining the percentages of permanent~~
19 ~~disability, account shall be taken of the nature of the physical injury~~
20 ~~or disfigurement, the occupation of the injured employee, and his~~
21 ~~or her age at the time of the injury, consideration being given to~~
22 ~~an employee's diminished future earning capacity.~~

23 ~~(b) (1) For purposes of this section, the "nature of the physical~~
24 ~~injury or disfigurement" shall incorporate the descriptions and~~
25 ~~measurements of physical impairments and the corresponding~~
26 ~~percentages of impairments published in the American Medical~~
27 ~~Association (AMA) Guides to the Evaluation of Permanent~~
28 ~~Impairment (5th Edition).~~

29 ~~(2) For purposes of this section, an employee's diminished future~~
30 ~~earning capacity shall be a numeric formula based on empirical~~
31 ~~data and findings that aggregate the average percentage of~~
32 ~~long-term loss of income resulting from each type of injury for~~
33 ~~similarly situated employees. The administrative director shall~~
34 ~~formulate the adjusted rating schedule based on empirical data and~~
35 ~~findings from the Evaluation of California's Permanent Disability~~
36 ~~Rating Schedule, Interim Report (December 2003), prepared by~~
37 ~~the RAND Institute for Civil Justice, and upon data from additional~~
38 ~~empirical studies.~~

39 ~~(c) The administrative director shall amend the schedule for the~~
40 ~~determination of the percentage of permanent disability in~~

1 accordance with this section at least once every five years. This
2 schedule shall be available for public inspection and, without
3 formal introduction in evidence, shall be prima facie evidence of
4 the percentage of permanent disability to be attributed to each
5 injury covered by the schedule.

6 (d) The schedule shall promote consistency, uniformity, and
7 objectivity. The schedule and any amendment thereto or revision
8 thereof shall apply prospectively and shall apply to and govern
9 only those permanent disabilities that result from compensable
10 injuries received or occurring on and after the effective date of the
11 adoption of the schedule, amendment or revision, as the fact may
12 be. For compensable claims arising before January 1, 2005, the
13 schedule as revised pursuant to changes made in legislation enacted
14 during the 2003-04 Regular and Extraordinary Sessions shall apply
15 to the determination of permanent disabilities when there has been
16 either no comprehensive medical-legal report or no report by a
17 treating physician indicating the existence of permanent disability,
18 or when the employer is not required to provide the notice required
19 by Section 4061 to the injured worker.

20 (e) On or before January 1, 2005, the administrative director
21 shall adopt regulations to implement the changes made to this
22 section by Chapter 34 of the Statutes of 2004.